formation from one State into another is of itself sufficient to constitute interstate commerce.[11]

By the recent case of *U. S. Fidelity & Guaranty Co.* v. *Kentucky* (1913) 34 Sup. Ct. Rep. 122,[12] the controversy seems to have been set at rest. The plaintiff in error was a Maryland commercial agency with attorneys in Kentucky who informed inquirers concerning the financial standing of local merchants. Relying on the authority of the *Textbook Case,*[13] it was urged that the corporation was exempt from the state tax sought to be enforced, because, through its agents, information was sometimes sent across the state line by mail, telephone or telegraph, to merchants engaged in interstate commerce. The court decided that the plaintiff's business was too remotely and indirectly connected with any transportation of goods from one State to another to be considered an incident of interstate commerce. A like conclusion was reached in the only other reported case on the point,[14] which was decided before the status of a correspondence school had been authoritatively determined by the Supreme Court, and was put on the ground that a mercantile agency is not such an important instrument of commerce that it should be grouped with the telegraph and telephone. It is impossible to doubt the court's wisdom in declining to interfere further with the State's taxing power unless the burden on interstate commerce be direct and substantial, and its treatment of commercial agencies in this respect is essentially practical. The distinction attempted to be drawn, however, that if any commercial contracts resulted, they were made between the local inquirers and the foreign merchants concerning whose credit information was furnished, and not between the parties to the correspondence in question, seems a rather tenuous one. In requiring a direct connection between the transportation of commodities and the interstate transmission of information before the latter will be termed commerce, the court adopts the earlier conception of commerce and refuses to extend the application of the commerce clause to the intangible.

Relation of Insurance to Interstate Commerce.—The remarkable development in the United States of insurance as an interstate business, and the increasing tendency on the part of the states to restrict the powers of foreign insurance companies through taxation and local regulations, have provoked an insistent demand during the last decade for a broadened construction of the Commerce Clause[1] that will permit of the federal supervision of insurance,[2] in all but its intrastate aspects. That the effecting of fire insurance between companies and citizens domiciled in different states does not fall within the purview of the Clause was early announced in the leading case of *Paul* v. *Virginia;*[3] and this principle was later declared applicable to

[11] 24 Harvard Law Rev. 230; 8 Michigan Law Rev. 663, 664; but see 23 Harvard Law Rev. 644.

[12] Affirming U. S. Fidelity & Guaranty Co. *v.* Commonwealth (1910) 139 Ky. 27.

[13] International Textbook Co. *v.* Pigg, *supra.*

[14] State *v.* Morgan (1891) 2 S. Dak. 32, 54.

[1] U. S. Const., Art. 1, § 8, subd. 3.

[2] 29 Rep. Amer. Bar Assn. 538 (1906).

[3] (1868) 8 Wall. 168.

marine[4] and life insurance.[5] These cases rest upon the ground that the issuing of a policy of insurance is neither commerce nor an instrumentality of commerce, but at most a local incident thereof;[6] and it is patent that if the conception of insurance as a business be limited to the issuing of the policy alone, this conclusion is inevitable, since the contract is effected at the place of acceptance, and whether the negotiations leading thereto are interstate or intrastate in character seems immaterial. It may be argued that since the contract contemplates an exchange of money or things in action rather than of commodities, it involves no acts of commerce in its performance and is properly subject to state regulation. But the soundness of such a limitation on the application of the Commerce Clause may be questioned in view of the more recent decisions holding that the transmission of telegraph messages,[7] as well as the transportation of persons[8] and the imparting of instruction through the mail,[9] constitute interstate commerce.[10] Even accepting this limitation, however, the chief vice of the "Insurance Cases" is in their failure to distinguish between the essential characteristics of fire, marine, and life insurance policies. That a policy of fire insurance is not a subject of trade and barter was the decisive ground advanced in *Paul* v. *Virginia*.[11] Policies of marine and life insurance, however, are now freely assignable,[12] while life policies, at least, are common subjects of pledge or use as collateral security. As such, they come clearly within the definition of articles of interstate commerce, and it would follow that the contracts involving the transmission of such policies from state to state are essential incidents of interstate commerce and therefore immune from antagonistic state legislation.[13]

It is notorious also that the many state laws for the taxation and

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[4]Hooper *v.* California (1895) 155 U. S. 648.

[5]N. Y. Life Ins. Co. *v.* Cravens (1900) 178 U. S. 389.

[6]Paul *v.* Virginia, *supra*, 183; Hooper *v.* California, *supra*.

[7]W. U. Tel. Co. *v.* Pendleton (1887) 122 U. S. 347. The same principle is applied to messages by telephone. Muskogee Tel. Co. *v.* Hall (C. C. A. 1902) 118 Fed. 382.

[8]Hoke *v.* U. S. (1913) 227 U. S. 308; Covington Bridge Co. *v.* Kentucky (1894) 154 U. S. 204.

[9]International Textbook Co. *v.* Pigg (1910) 217 U. S. 91; see note on the "Application of the Commerce Clause to the Intangible," *supra* p. 147.

[10]Champion *v.* Ames (1903) 188 U. S. 321, in which it was held that Congress might prohibit lottery tickets from interstate commerce, furnishes a striking analogy, since a lottery ticket, like an insurance policy, is evidence of a right contingent on the happening of a future event. On the other hand the Supreme Court, although holding bills of exchange to be instruments of commerce, has upheld a state tax on a broker dealing only in foreign bills, Nathan *v.* Louisiana (1850) 8 How. 73, a doubtful result in view of the fact that the exchange of these instruments among the states is the chief feature of that business. See also Prentice & Egan, The Commerce Clause, 46-9.

[11]8 Wall. 183.

[12]2 May, Insurance, §§ 377, 388; 13 Columbia Law Rev. 742.

[13]Rearick *v.* Pennsylvania (1906) 203 U. S. 507; Robbins *v.* Shelby Taxing District (1887) 120 U. S. 489; International Textbook Co. *v.* Pigg, *supra;* 2 Willoughby, Constitution, §§ 294-6.

control of foreign insurance companies[14] have led to complexity, oppression and arbitrary discrimination,[15] the very defects which necessitated the adoption of the Commerce Clause as to trade in general.[16] A liberal construction of the Clause to include insurance, therefore, would seem to be not only judicially correct, but economically wise, since upon the policy-holders ultimately fall the burden of state exactions.

These contentions, so strongly urged by the plaintiff in the recent case of *New York Life Ins. Co.* v. *Deer Lodge County* (1913) 34 Sup. Ct. Rep. 167, were rejected by seven members of the Supreme Court,[17] and the orthodox doctrine adhered to. In this case the company sought to recover the amount of a tax paid upon the excess of its receipts above its disbursements in the defendant county. The insurance contracts were uniformly effected at the plaintiff's home office in New York; loans and payments on the policies were made directly from this office; and premiums were remitted there, or paid to the company's cashier in Montana for deposit subject to withdrawal by the company. Despite the obvious interstate character of these transactions the Court refused to adjudge them to be interstate commerce, and denied the plaintiff relief. The principal case, therefore, while dealing only with the power of the states to regulate foreign insurance companies, would seem to deny validity to any action by Congress under the Commerce Clause to secure federal supervision of insurance.[18]

RESTRAINT OF TRADE AT COMMON LAW.[1]—It is well known that the early common law, as evidenced at least by dicta, prohibited as against public policy all contracts whereby a party bound himself to refrain from the pursuit of his trade or occupation.[2] It is also familiar law that because of vastly altered economic conditions this rule has everywhere been much relaxed by judicial decision,[3] and this has been referred to as an excellent example of the adaptability of the common law.[4] It may be stated generally even today that all agreements tending directly to create a monopoly are void.[5] Assuming, however, that the transaction does not fall within the ban of this rule, a contract in restraint of trade will be upheld, provided that a proper relation, of

[14]See, for example, Oregon Laws, § 4634; N. Y. Ins. Law, § 33; Okla. Const. Art. 19, § 2; *cf.* State *ex rel.* Equitable Life Assur. Soc. *v.* Vandiver (1909) 222 Mo. 206.

[15]17 Green Bag 83; 29 Rep. Amer. Bar Assn. 538.

[16]Watson, Constitution, 461-2.

[17]Justices Hughes and Van DeVanter dissented without opinion.

[18]Upon this ground the Judiciary Committees of the Senate and the House in 1906 reported adversely to the power of Congress to enact such legislation. See 29 Rep. Am. Bar Assn. 538, 584.

[1]For a discussion of the Sherman Anti-Trust Law, see 11 Columbia Law Rev. 701; 4 Columbia Law Rev. 315, 325.

[2]7 Columbia Law Rev. 50.

[3]*Ibid.*

[4]Sir Frederick Pollock, "The Genius of the Common Law", 13 Columbia Law Rev. 3.

[5]Flowers *v.* W. P. Smith Lumber Co. (1908) 157 Ala. 505; Chapin *v.* Brown Bros. (1891) 83 Ia. 156.